

RIGHT OF PEOPLES TO SELF-DETERMINATION IN THE PRESENT INTERNATIONAL LAW

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I. INTRODUCTION

Generally speaking, right to self-determination means the right of a particular group of people to freely determine and control their political, economic or socio-cultural destinies. The development of self-determination as a definite legal concept is in tandem with the development of government. It traces its origin, as a political and constitutional principle, to the democratic principles proclaimed by the American and French revolutions of 1776 and 1789 respectively¹. But its development as a legal principle in international law could be traced to the works of Joseph Stalin², Vladimir Lenin³ and Woodrow Wilson⁴ in 1913 and 1916 respectively.

II. INTERNATIONAL LEGAL INSTRUMENTS PROVIDING FOR THE RIGHT

In the years after World War II, through the decolonisation process and up to the present international legal order, international and regional organisations have drawn up legal instruments which have accentuated self-determination from a mere a principle to a right in international law.

A. **Article 2 of the United National Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly Resolution 1514(XV) of 14 December 1960:**

“All Peoples have the right to self-determination, by virtue of economic, social and cultural development.”

B. **Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly Resolution 2621 (XXV):**

“Reaffirming that all peoples have the right to self-determination and independence and that the subjugation of the peoples to alien domination constitutes a serious impediment to the maintenance of international peace and security and the development of peaceful relations among nations.

C. **Article 1 of the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 1 of United Nations International Covenant on Civil and Political Rights (ICCPR), all of 1966:**

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¹ O.U Umzurike, Self-Determination in International Law, U.S.A, Archon Books (1972), pp.4 & 6.

² J. Stalin, “Marxism and the National Question” (1913), in J.Stalin, Marxism and the National and Colonial Question. A Collection of Articles and Speeches, London, Lawrence & Wishart (1941), p. 19.

³ V.I Lenin, “Thesis on the Socialist Revolution and the Right of Nations to Self-Determination”, in Collected Works, 4th English Edition, Vol. 22, Moscow, Progress Publishers (1964), pp.143-156 .

⁴ R.S Baker and W.E Dodd (eds.), The Public Papers of Woodrow Wilson, The New Democracy, Vol. 2, New York, Harper & Bros (1926), p.2.

“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.

D. United Nations Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Chapter of the United Nations (General Assembly Resolution 2625(XXV) of 25 October 1970):

“By virtue of the principle of equal rights and self-determination of peoples enshrined in the Chapter, all peoples have the right freely to determine without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with provisions of the Charter.”

E. Conference on Security and Co-operation in Europe (CSCE), Helsinki Final Act, August 1, 1975:

“By virtue of equal rights and self-determination of peoples, all people always have the right, freedom to determine, when and as they wish, their internal and external political status, without external interferences and to pursue as they wish their political, economic, social and cultural development.”

F. African Charter of Human and Peoples Right, 1981:

Article 19- *“(2) Nothing shall justify the domination of a people by another.”*

Article 20 – *“All peoples shall have right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen”.*

G. Vienna Declaration and Programme of Action, 1993:

“All peoples have the right to self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development.”

H. Organisation for Security and Co-operation in Europe (OSCE), Charter of Paris for a New Europe, 1994:

“We affirm the equal rights of peoples and their right to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of states.”

It should be noted that the above-stated international instruments providing for right to self-determination are founded on the principles of equal rights and self-determination of peoples as enshrined in the Charter of the United Nations, 1945 particularly *Articles 1* and *55* thereof.

It is also worthy to note that treaties and resolutions of United Nations or regional organisations are exhortatory in nature and are only binding on state parties by the fact of domestication or of crystallisation into customary international law⁵. Such treaties or resolutions crystallise into customary international law by virtue of state (international and regional organisations inclusive) practice coupled with *Opinion juris sive necessitates* which in the words of M.N Shaw, simply means “the belief by a state that behaved in a certain way that it was under a legal obligation to act that way.”⁶. It is submitted that once the treaties or resolutions have crystallised into customary international law, they become directly binding on state parties without a need for domestication.

III. TYPES OF SELF – DETERMINATION

There are basically two types of self-determination, viz; (1) Internal self-determination; and (2) External self-determination.

Thus, M. C van Walt van Praag and O. Seroo in their report and analysis of the International Conference of Experts on the “Implementation of Right to Self-Determination as a contribution to conflict prevention” held in Barcelona, from 21-27 November 1998 succinctly explained as follows:

“By Internal self-determination is meant participatory democracy; the right to decide the form and identity of rulers by the whole population of a State and the right of a particular group within the State to participate in decision making at the State level. Internal self-determination can also mean that right to exercise cultural, linguistic, religious or (territorial) political autonomy within the boundaries of the existing state. By external self-determination (described by some as ‘full self-determination’) is meant the right to decide on the political status of a people and its place on the International community in relation to other states including the right to separate from the existing states of which the group concerned is a part, and to set up a new independent state”.⁷

In other words, ‘Internal self-determination’ can take the form of participatory democracy, federalism, confederalism, unitarism, regionalism, local government, self-government within the existing state or any other arrangement that accord with the wishes of the people but compatible with the sovereignty and territorial integrity of the existing state. ‘External self-determination’ on the other hand can take the form of independence or separation or secession or self-government outside the existing state, or any other association that accord with the wishes of the people, which may not be compatible with the sovereignty and territorial integrity of the existing state.

Thus, the United Nations *Resolution 2625 (XXV)* provides that:

“The establishment of a sovereign and independent state, the free association or integration with an independent state, or the emergence into any other political status freely determined by a people constitutes mode of implementing the right self-determination by that people.”

⁵ M.N Shaw, *International Law*, 4th edition, Cambridge University Press, (1997), pp. 54-98.

⁶ M.N Shaw, *ibid*.

⁷ M.C van Walt van Praag & O. Seroo, available at <http://www.unescocat.org/pubang.html> [Retrieved on 09/11/12]

IV. MEANING OF “PEOPLE” TO WHOM THE RIGHT INHERES

The UNESCO International Meeting of Experts for the Elucidation of the study of the Concepts of Right of peoples, in 1989, provided a detailed and standard description of “people”. According to the description which is some times referred to as the “Justice Kirby definition”, a ‘people’ is:

“a group of individual human beings who enjoy some or all of the following common features:

- (a) a common historical tradition;*
- (b) a racial or ethnic identity;*
- (c) cultural homogeneity;*
- (d) linguistic unity;*
- (e) religious or ideological affinity;*
- (f) territorial connection;*
- (g) common economic life.”⁸*

In addition to the above description, the UNESCO Experts added that: *“the group must be of a certain number which need not be large...but which must be more than a mere association of individuals within a state”; the group as whole must have the will to be identified as a people or the consciousness of being a people...”; and “the group must have institutions or other means of expressing its common characteristics and will for identity.”⁹*

It is submitted that the above presupposes self-identification, numerical superiority and dominant position in the existing state to which the group belong.

It is to be noted that there is a difference between “people” as an entity on one hand and “indigenous people” and “minority” as entities on the other hand. The difference lies in the fact of dominant position in the existing state and numerical superiority characteristics of “people” which are lacking in “indigenous people” and “minority”. Aside these distinguishing characteristics “indigenous people” and “minority” share similar characteristics with “people”. Thus, J.R.M Cobo, the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, opines that:

“Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.”¹⁰

In addition, M.C van Walt van Praag and O.Seroo¹¹ writes that:

⁸ Available at <http://unesdoc.unesco.org/images/0008/000851/085152Eo.pdf> [Retrieved on 09/11/2012]

⁹ Ibid

¹⁰ “Background paper for the UN Workshop on Data Collection and Disaggregation for Indigenous peoples” (2004), New York, available at <http://social.un.org/index/IndigenousPeoples/MeetingsandWorkshops/WorkshopDataCollection.aspx> [Retrieved on 09/11/2012]

¹¹ Supra note 6.

“What constitutes a minority is ...largely a question of self-identification. However, the principal elements in any definition include numerical inferiority, ethnic, linguistic, cultural or religious characteristics distinct from those of the rest of the population of a state and the non-dominant position of the minority.”

Notably, a “people” is entitled to both ‘Internal and External self-determination’, whereas an “indigenous people” and “minority” are entitled only to ‘Internal self-determination’. In other words, the right to ‘External self-determination’ inheres only in ‘peoples’ (and not in ‘minorities’ or ‘indigenous peoples’). This was the position expressed in *Opinion No. 2 (1992), Arbitration Commission of the European Conference on Yugoslavia*¹² with regard to the Serbia population of Bosnia-Herzegovina. Thus, Higgins comments that:

*“‘people’ is to be understood in the sense of all the people of a given territory. Of course, all members of distinct minority groups are part of the people of the territory. In that sense they too as individuals are holders of the right of self-determination. But minorities as such do not have a right of self-determination. That means in effect that they have no right to secession, to independence or to join with comparable groups in other States”.*¹³

And J.R.M Cobo¹⁴ posits that:

“Self-determination is essentially a right of peoples...it is peoples as such which are entitled to the right to self-determination. Under customary international law minorities do not have this right.”

However, it is submitted that a group of minorities can qualify as a “people” if they possess the will to be identified as a “people” or the consciousness of being a “people” and if they have institutions or other means of expressing their common characteristics and will.

V. SECESSION BY WAY OF SELF-DETERMINATION

Secession is described as “full self –determination”. It deserves special comment because of its decisive nature. It is in fact what W. Danspeckgruber¹⁵ and M.C van Walt van Praag¹⁶ had in mind when they asserted respectively that: *“No other concept is as powerful, visceral, emotional, unruly, as steep in creating aspirations and hope as self-determination”*, and *“It [self-determination] evokes emotions, expectations and fears which often lead to conflict and bloodshed”*.

The first secession ever recorded in the history of humanity (biblically speaking), was the division of the kingdom of Israel. The division was as a result of the perceived oppression by king Rehoboam and his recalcitrance in departing from the oppressive leadership style of his father-predecessor, King Solomon. The people of Israel saw secession as the only hope of

¹² (1992) 31 ILM 1497

¹³ Quoted in Harris, D.J Cases and Materials on International Law, 5th Ed., Sweet & Maxwell (1998), pp.120& 121

¹⁴ Supra note 9.

¹⁵ Available at <http://www.unpo.org/section/2/2> [Retrieved on 09/11/2012]

¹⁶ Supra note 6.

survival – a last resort. Thus the Kingdom of Israel was divided in a very strong revolutionary declaration:

“...What portions have we in David? Neither have we inheritance in the son of Jesse: To your tents, O Israel: now see to thine own house, O David”.¹⁷

The general rule, according to customary international law is that, only peoples in a classic colonial situation or context have the right to secession by way of self-determination- “salt-water colonialism doctrine”. The above position is founded on the logic that one people can only exercise its right to self-determination once. However, there are exceptions to the above general rule, which like the general rule itself have crystallised into customary international law. The exceptions include consent of state and flagrant/serious human rights violations.

A. Consent of State

The state to which a people belong may consent to the demand of that people for secession. Thus, the Arbitration Commission of the Peace Conference on Yugoslavia in *Opinion No.2*¹⁸ stated thus:

“.....it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (uti possiditis) except where the states concerned agree otherwise.”

B. Flagrant/Serious Human Rights violations

Peoples in non-colonial situations are entitled as of right to secession from the existing independent state, where they suffer flagrant/serious human rights violations including persistent oppression, annihilation/targeted killings, domination, discrimination, marginalisation, and other grave injustices in the state to which they belong. Thus, United Nations *Resolution 2625(XXV)* states that:

“..... Nothing in the foregoing paragraph [affirming the right of self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair...the territorial integrity ...of sovereign and independent states conducting themselves in compliance with the principle of equal rights and [internal] self-determination of peoples”.

The above position has been endorsed by international legal writers and jurist. Thus the International Commission of Jurists in its report on Bangladesh’s secession in 1971 states as follows:

“If one constituent peoples of a state is denied equal rights and discriminated against, it is submitted that their full right of self-determination will revive.”¹⁹

¹⁷ 1 Kings 12: 16 (KJV).

¹⁸ Supra, note 11.

¹⁹ International Commission of Jurists, ‘East Pakistan Staff Study’, The Review (1972), no. 8, p.46.

In the case of *Katangese Peoples' Congress v. Zaire*²⁰, the African Commission on Human and People Rights, recognising the right of the Katanga people of Zaire to secession, stated as follows:

"In the absence of concrete evidence of violations of human rights [of the Katangese] to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire."

It is submitted that, had there been concrete evidence of extreme violations of human rights of the Katangese, the Commission would have held otherwise. Similar reasons were given by the Supreme Court of Canada in the case of *Reference Re Secession of Quebec*²¹ in deciding that the people of Quebec have no right to unilateral secession from Canada:

"[A] right to secession only arises under the principle of self-determination of people at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within ... the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states."

Supporting the above positions, M. C van Walt van Praag and O. Seroo²² elaborate that:

"...separation or secession from the state of which a people forms a part should be regarded as a right of last resort. Thus, if the state and its successive government have repeatedly and for a long period oppressed a people, violated the human rights and fundamental freedoms of its members, excluded its representatives from decision especially in matters affecting the well being and security of the people, suppressed their culture, religion, language and other attributes of the identity valued by the members, and if, other means of achieving a sufficient degree of government have been tried and have clearly failed, then the question of secession can arise as a means for the restoration of fundamental rights and freedoms and the promotion of the well being of the people. This right could be regarded as analogous to the right of last resort of rebellion

²⁰ African Commission on Human and Peoples' Rights, Comm. No. 75/92 (1995), available at <http://www1.umn.edu/humanrts/africa/comcases/75-92.html> [Retrieved on 09/11/2012]

²¹ [1998] 2 S.C.R. 217

²² Supra note 6.

against tyranny and oppression referred to in the preamble to the Universal Declaration of Human Rights”.

A. Cassese²³ further adds that:

“...a racial or religious group may attempt secession, a form of external self-determination, when it is apparent that internal self-determination is absolutely beyond reach. Extreme and unrelenting persecution and the lack of any reasonable prospect for peaceful challenge may make secession legitimate.”

Examples of secession by way of self-determination in non-classic colonial situation include: the separation of East Pakistan from West Pakistan in 1971 to form Bangladesh; the dissolution of the former Union Socialist Soviet Republic-USSR (Soviet Union) in 1991; the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY) in 1991; the dissolution of Czechoslovakia in 1993; the separation of Eritrea from Ethiopia in 1993; the secession of South Sudan from the Republic of Sudan in 2011 etc.

VI. CONCLUSION

The right of peoples to self-determination is a legally recognised right in international law. The UNESCO International Meeting of Experts in 1989 “found that the right to self-determination is conferred on the peoples by international law itself and not by states”²⁴. The *erga omnes* (universality) character of the right appears to have been endorsed by the International Court of Justice (ICJ). Thus, in the case of *Portugal Vs. Australia (the East Timor case)*²⁵, the ICJ stated that: *“Portugal’s assertion that the right of peoples to self-determination as it evolved from the Charter and from the United Nations practice, has erga omnes character is irreproachable.”*

Arguably, the right of peoples to self-determination qualifies as a norm of *jus cogens* (i.e. peremptory norm of international law which cannot be derogated from except by another peremptory norm of the same character). Thus, the ICJ asserted in the *East Timor case* that: *“The principle of self-determination as recognised in the United Nation Charter and in the jurisprudence of the Court.....is one of the essential principles of contemporary international law”.*

However, it is to be noted that the right to self-determination is limited to the extent that the rights of others, such as freedom of expression, religion etc and the general interest of the society, especially the need to maintain international peace and security, are protected. Thus Article 5(1) of the United Nations *International Covenant on Economic, Social and Social and Cultural Rights (ICESCR)* and *United Nations International Covenant on Civil and Political Rights (ICCPR)* provide that:

“Nothing in the present covenant may be interpreted as implying for any state, group of persons any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein.”

²³ Quoted in Shaw, M.N, Supra note 4, p.2107

²⁴ M.C van Walt van Praag & O. Serroo, Supra note 6.

²⁵ I.C.J Rep.1995, 90.

Rationlising this provision, Professor R. McCorquadale²⁶ asserts that “...*the right of both individuals and groups need to be protected against oppressive acts in the name of self-determination.*”

Statehood is a matter of social contract. Accordingly, M.C van Walt van Praag and O. Seroo²⁷ posit that:

“For peace, security and stability to exist, any associations between peoples and communities or between them and the state must be based on genuine and continuing consent, mutual respect and mutual benefit. Peace cannot exist in states that lack legitimacy or whose governments threaten the lives or well being of a section of the population”.

²⁶ “Self - Determination: A Human Rights Approach”, ICLQ (1994), Vol. 43, Issue 04, pp. 857-885

²⁷ Supra note 6.